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No. 89-472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAURICE WHITE, *et al.*,

Petitioners,

v.

CELOTEX CORPORATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1. Whether Petitioners have waived appellate review of the alleged inconsistency in the jury's responses to Rule 49(b) special verdict interrogatories, because they failed to object to the alleged inconsistency prior to the discharge of the jury.

2. Whether the Federal District Court correctly exercised its discretion in denying Petitioners' motion for a new trial, where the evidence was sufficient to support the responses of the jury to special verdict interrogatories and where these responses and the general verdict for Respondents were consistent and harmonious.

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Federal Rule of Civil Procedure 49(b). 4,7,8,13

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Respondents Celotex Corporation, GAF Corporation and Keene Building Products Corporation respectfully pray that this Court deny a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered June 21, 1989.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 878 F.2d 144 (4th Cir. 1989). The United States District Court for the District of Maryland did not publish an opinion in this case.

Statement of the Case

Respondents generally accept the Statement of the Case contained in the Petition for Writ of Certiorari, with the addition that Respondents produced expert medical testimony at trial that none of the Petitioners suffered from any impairment as a result of asbestos exposure.

REASONS FOR DENYING THE PETITION

Petitioners sidestep the fundamental and antecedent question of whether the jury's answers to the Federal Rule of Civil Procedure 49(b) special verdict interrogatories were inconsistent. They simply assume the inconsistency. Of course, "settled principles require that [courts] harmonize the jury's several pronouncements if possible rather than use the answers to special questions as weapons for destroying the general verdict. . . . Unless there is no 'possible view of the case' on which valid findings support the general verdict . . . . we must uphold the jury's final decision to avoid a potential 'collision with the Seventh Amendment.'"

Julien J. Studley, Inc. v. Gulf Oil Corp., 407 F.2d 521, 526-527 (2d Cir. 1969). See also, Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962), reh. den., 369 U.S. 882; Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 119 (1963).

In the present case, the jury's answers were neither inconsistent nor illogical. The jury simply concluded that, while the Petitioners may have sustained minor physiological changes from asbestos exposure, these changes were too trivial and non-impairing to support an award of monetary damages. Respondents' medical expert witnesses testified at trial that none of the Petitioners was impaired as a result of any physiological change attributable to asbestos exposure. Several Plaintiffs

had long histories of tobacco abuse which easily accounted for any subjective complaints of shortness of breath. Certainly it is not an inconsistency for the jury to believe the Respondents' experts.

In addition, the jury's finding that the Petitioners had not "incurred any damages proximately caused as a result of the harm" of their asbestos-related conditions (Jury Interrogatory 3) was tantamount to, and harmonious with, the rendering of a general verdict in favor of Respondents.

The fact that the jury's answers readily can be harmonized with one another and with the general verdict for Respondents renders Petitioners' arguments concerning their untimely objections moot.

The thrust of the Petition is not that the Fourth Circuit was wrong in affirming the final verdicts based on Petitioners' counsels' failure to object timely to the verdicts. Rather, Petitioners merely raise the prospect of a "split among the Circuit Courts" on when objections must be made under Rule 49(b) to justify the extraordinary grant of a writ of certiorari. Issues such as the timeliness of objections to preserve appellate review of the sufficiency of evidence to sustain jury verdicts does not seem to be the stuff of paramount public importance so as to merit review by this Court.

In support of their contention that a conflict exists among the Circuit Courts regarding Federal Rule of Civil

Procedure 49(b), Petitioners cite just three cases. These cases demonstrate no such conflict.

Petitioners contend that the Ninth Circuit broadly held in Los Angeles Nut House v. Holiday Hardware Corp., 825 F.2d 1351 (9th Cir. 1987), that failure to object to inconsistent jury answers before the jury is discharged does not result in a waiver of that issue on appeal. The holding in the Los Angeles Nut House case is narrow. In fact, the Ninth Circuit held only that an objection to an alleged inconsistency is not waived on appeal, where the trial judge does not ask for objections prior to excusing the jury. Id. at 1354-1356. In the present case, after the jury's answers were read, the trial judge explicitly asked all counsel in open court if any had

questions or comments before the jury was discharged. All counsel, including counsel for Petitioners, responded negatively. Only then was the jury discharged. Thus, Petitioners' reliance on Los Angeles Nut House, supra, is misplaced.

The Ninth Circuit did note in Los Angeles Nut House, supra, that when an inconsistency exists between a general verdict and a written jury interrogatory, the inconsistency should be resolved in favor of sustaining the general verdict if possible. Id. at 1353-1354. This would indicate that the instant interrogatories should be conformed to the general defense verdict.

In Bahamas Agricultural Industries, Limited v. Riley Stokes Corporation, 526 F.2d 1174 (6th Cir. 1975), the Court did

not address directly the issue of the timeliness of an objection to inconsistent jury answers. This case is thus inapposite. The decision in Bahamas Agricultural Industries, supra, concerned jury interrogatory answers which were patently inconsistent with one another and with the general verdict. The jury incongruously found: (1) that the negligence of Defendant Riley Stokes Corporation was not a proximate cause of the stipulated damages; and (2) that the Plaintiff was 80 percent negligent. Nevertheless, the jury awarded a general verdict in favor of Plaintiff against Defendant. The Sixth Circuit found in this case an unreconcilable inconsistency in the jury's answers. It ruled that the trial judge should have returned the jury

for further consideration of its answers or ordered a new trial.

The Second Circuit decision cited by Petitioners is similarly inapposite. In Schaafsma v. Morin Vermont Corp., 802 F.2d 629 (2d Cir. 1986) the court's decision did not turn on the timeliness of the objection to allegedly inconsistent jury answers. Rather, it dealt with the court's finding that the jury's answers were not inconsistent at all. Id. at 635. The court noted that "in fairness to trial courts and in order to preserve parties' Seventh Amendment rights, appellate courts 'struggle' to find a way of reconciling seemingly inconsistent interrogatory answers and verdicts...." Id. at 635. The Second Circuit reversed the trial court in part due to the court's faulty charge to the

jury and failure to include an interrogatory concerning a requested remedy, i.e. rescission.

No genuine conflict exists between the Circuits with regard to the necessity of timely objection to allegedly inconsistent jury interrogatory answers. The three cases upon which Petitioners rely to demonstrate such a conflict upon analysis are easily distinguishable. Either the references to failure to object to allegedly inconsistent verdicts before discharge of the panel were obiter dicta, or the trial court never inquired of counsel about such inconsistencies before dismissing the jurors. Neither situation is apposite to the instant case. The verdicts were totally consistent and in harmony with the general defense verdicts. There was

ample evidence from the medical experts to support the defense verdicts. Also, even though specifically solicited for comments before discharge of the jury, Petitioners' counsel never intimated any problem with the consistency of the verdict until the filing of a motion for new trial, days after the trial ended. As the Fourth Circuit pointed out, to adopt Petitioners' construction of Rule 49(b) "eliminates the rule's incentives for efficient trial procedure and opens the door to the possible misuse of the rule's procedures by parties anxious to circumvent an unsatisfactory jury verdict by procuring a new trial." United States Football League v. National Football League, 644 F.Supp. 1040, 1049 n. 8 (S.D.N.Y. 1986), aff'd 842 F.2d 1335 (2d Cir. 1988); Skillen v. Kimball, 643 F.2d 19, 20 (1st Cir. 1981).

Conclusion

For the foregoing reasons, Respondents respectfully pray that this Court deny a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

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October 25, 1989

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 1989 I mailed, first class postage prepaid, three copies of the proceding Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit to: Thomas W. Henderson, Esquire, Antonio D. Pyle, Esquire, 1030 Fifth Avenue, Third Floor, Pittsburgh, Pennsylvania 15219.

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